INSIGHT

THE EXPRESSIVE DIMENSION OF THE UNION CITIZENSHIP EXPULSION REGIME: JOINED CASES C-331/16 AND C-366/16, *K AND HF*

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ABSTRACT: The case of in *K and HF* (Court of Justice, judgment of 2 May 2018, joined cases C-331/16 and C-366/16) turns on a very specific set of facts, namely the restriction of Union citizen's residence rights on the basis of war crimes and crimes against humanity. Nonetheless, in its judgment the Court of Justice continues its development of the expulsion regime for Union citizens to incorporate an offence based, moralised interpretation of public policy and public security. In doing so, it develops an expressive dimension to the expulsion regime, using it to express the values of the Member States and the Union legal orders.

KEYWORDS: Geneva Convention Art. 1F – public policy and public security – expulsion – fundamental Interests of Member States – Arts 2 and 3 TEU – EU citizenship.

I. INTRODUCTION

The judgment rendered on 2 May 2018 by the Court of Justice in *K and HF*[1] is exceptional in both sense of the word. It is exceptional in the interpretation given to various terms in the Citizens Directive, in particular in relation to the expulsion regime contained in its Chapter VI. It is also exceptional in the literal sense of the word; it relates to a very particular set of circumstances – whereby, in the context of asylum proceedings, credible reasons have been advanced to believe that a Union citizen (or family member of a Union citizen) has committed war crimes – which are unlikely to be replicated very often in the future. Nonetheless, regardless of whether these facts are likely to repeat in the future, the judgment in *K and HF* confirms a trend in the Union citizen expulsion regime towards an interpretation of criminal law based on the values of the legal order of host Member State and the Union and an emphasis on past offence rather than future threat. The result is a

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[1] Court of Justice, judgment of 2 May 2018, joined cases C-331/16 and C-366/16, *K v. Staatssecretaris van Veiligheid en Justitie and HF v. Belgische Staat* (*K and HF*).

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moralisation of criminal law within Union citizenship and the development of an expressive dimension to the expulsion regime.

The following note will provide a brief summary of the facts and context of the case, followed by a summary of the Opinion of the Advocate General and of the Grand Chamber's judgment. A final section will highlight some key aspects of the judgment and reflect on its possible implications for the development of the Union citizenship.

II. Facts/Context

II.1. Case C-331/16, *K*

K, a national of both Bosnia-Herzegovina and Croatia, arrived in the Netherlands in 2001 and applied for asylum. His application for asylum was rejected after a determination that there were serious grounds for believing that he both knew about and participated in war crimes during the conflict following the break-up of Yugoslavia.[2] K was therefore excluded from refugee status by virtue of Art. 1F of the 1951 Geneva Convention, which excludes individuals who have committed war crimes or acts which offend the values of the United Nations from refugee status. He was issued with an entry ban and ordered to leave the Netherlands, but it appears that he did not comply and the entry ban was not enforced. He remained in the Netherlands, where he enjoyed a family life and had a child. Upon the accession of Croatia to the EU in 2014, he applied for the entry ban to be removed. In this action, he was successful, as an entry ban cannot be applied to a Union citizen. However, in light of the prior exclusion order, the Dutch authorities proceed to classify him as an undesirable person, and therefore to deny him a right of residence in the Netherlands. Such a measure was permitted under Art. 27 of the Citizenship Directive.[3] Mr K appealed the decision to refuse him residence in the Netherlands and the referring court, having doubts concerning the compatibility of the decision with the requirements contained in Chapter VI of Directive 2004/38/EC, posed a number of questions to the Court of Justice. Two questions concerned the link between an exclusion order and a measure restricting a Union citizen's rights under Art. 27 of the Citizenship Directive. A third question queried whether Mr K qualified for the heightened protection regime contained in Art. 28(3)(a), which is intended to offer additional protection from expulsion for all Union citizens who have been resident in the host Member State for ten years or more.

[2] Opinion of AG Saugmandsgaard Øe delivered on 14 December 2017, joined cases C-331/16 and C-366/16, *K v. Staatssecretaris van Veiligheid en Justitie and HF v. Belgische Staat* (*K and HF*), para. 18.

[3] Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

II.2. Case C-366/16, *HF*

HF arrived in the Netherlands in 2000 and applied for asylum. Like Mr K, his application was rejected on the basis of Art. 1F of the Geneva Convention. As a member of the intelligence agency of the communist regime in Afghanistan, he was accused of having committed or ordered the commission of war crimes in that country and an exclusion order was granted with respect to Mr HF's claim. Mr HF remained in the Netherlands for a number of years before moving to Belgium to live with his daughter, who was economically active and holds Dutch nationality. A number of applications for a residence permit as a family member of a Union citizen were rejected on the grounds that he posed a threat to public policy. As with Mr K, the rejection was based on the prior exclusion order issued by the Dutch authorities upon his arrival in the Netherlands. Having doubted whether the refusal to grant Mr HF a residence permit was compatible with Directive 2004/38/EC and with the Charter of Fundamental Rights, the Belgian *Raad voor Vreemdelingenbetwistingen* referred the matter to the Court of Justice.

III. Opinion of AG Saugmandsgaard Øe

The opinion of AG Saugmandsgaard Øe is clear, logical and largely accepts the submissions of the Member States on the key questions surrounding the definition of a fundamental interest of a Member State and the extent to which an individual who has been subject to an exclusion order under Art. 1F of the Geneva Convention many years before can constitute a threat to public order or public security under Art. 27 of the Citizenship Directive. Two key questions addressed in the Opinion concern the definition of a fundamental interest of a Member State and whether the mere presence of an individual can somehow constitute a *present* threat to such a fundamental interest.

The AG firstly considers whether a fundamental interest is at stake, a threat to which may justify a restrictive measure against a Union citizen. After pointing out that the definition of what constitutes a fundamental interest is a matter for each Member State, the AG proceeds to consider whether the interests put forward by the Member States at issue and by those who intervened in the case can be considered valid under Union law. Finding no reason to believe otherwise the AG accepts a number of distinct interests that may be served by refusing residence status to individuals who have previously been the subject of an exclusion order. These include the interest in the international relations of the state, the need to ensure that victims who may be residing in the state do not come into contact with their aggressors, the need to maintain the integrity of the asylum and migration regime of the state and finally the need to protect the values of the legal order and indeed those of the European Union, as embodied in Arts 2 and 3 TEU.[4]

[4] Opinion of AG Saugmandsgaard Øe, *K and HF*, cit., paras 60-69.

Secondly, the AG considers whether a threat is posed by such individuals to the fundamental interests thus identified. He first excludes the possibility of a residence ban under Art. 27 of the Citizenship Directive being the *automatic* consequence of a prior exclusion order, issued when the individual was an asylum applicant. This is due to the different nature of the legal regimes, the different rights at issue and the different interests at stake. A separate process, including a separate consideration of the case, therefore needs to take place under the conditions established in Chapter VI of the Citizenship Directive.[5] Nonetheless, if a restriction on a citizen's rights cannot be the *automatic* consequence of a previous exclusion order, a State is entitled to rely on the underlying facts and circumstances that formed the basis of that order. The fact that an exclusion order is not based on criminal liability does not affect that conclusion.[6]

When considering whether the threat was 'genuine, present and sufficiently serious', the AG, prompted by the questions raised by the national courts, focused on the condition that the threat be 'present'. While noting that under normal circumstances a present threat requires some risk of reoccurrence, the AG, relying on *Bouchereau*,[7] finds 'in some circumstances' a *present* threat can be based on past conduct. Thus, the mere presence of individuals who have (at least for the purposes of an exclusion order) committed war crimes is sufficient to constitute a threat.[8]

In relation to the questions of proportionality and fundamental rights, the AG points out the well-established conditions on any assessment of a decision restricting a Union citizen's rights under the Directive. These are the need for a proportionality assessment that takes into account the family and private life of the Union citizen and balancing this with the State's interests.[9] Finally, the AG finds that K does not enjoy the heightened protection arising from Art. 28(3)(a) of the Citizenship Directive. The ten years residence period referred to in Art. 28(3)(a) has a 'qualitative' dimension;[10] it must therefore be completed in a regular fashion and in compliance with the conditions contained in Art. 7 of the Citizenship Directive. While the AG considered that ultimately it

[5] *Ibid.*, paras 79-83.

[6] *Ibid.*, paras 84-87.

[7] Court of Justice, judgment of 27 October 1977, case 30/77, *Regina v. Pierre Bouchereau*.

[8] Opinion of AG Saugmandsgaard Øe, *K and HF*, cit., para. 105.

[9] *Ibid.*, paras 108 *et seq*.

[10] The Court of Justice has for some time now, included a 'qualitative dimension' in addition to mere presence over a certain period of time in a host Member State, when assessing the extent to which a Union citizen can be considered integrated into the society of the host Member State and therefore enjoy certain rights. While the concept is never elaborated upon in detail, the Court has used it to imply duties of economic activity and of good conduct on the part of Union citizens. For more detail S. Coutts, *The Absence of Integration and the Responsibilisation of Union Citizenship*, in *European Papers*, 2018, Vol. 3, No. 2, www.europeanpapers.eu, forthcoming.

was for the national court to determine, nothing in the file would indicate that Mr K was lawfully resident in the Netherlands.[11]

IV. Judgment of the Court of Justice

The Court of Justice, sitting in the Grand Chamber formation, largely follows the Opinion of the AG in its reasoning and outcome, while laying its stress at different points and using more emphatic language on occasion. The Court first finds that the interests raised by the Member States and accepted by the AG are indeed fundamental interests, a threat to which can constitute a threat to public security or public policy under the Citizenship Directive. Those interests include the international relations of the State, the need to ensure that citizens are not brought into contact with such individuals and the need to uphold the values of the legal order of the Member State and of the EU itself as reflected in Arts 2 and 3 TEU, with a particular emphasis on the Union law dimension to this.[12] When assessing whether there exists such a threat, the Court, much like the AG, finds that such a threat is not an automatic consequence of the issuance of an exclusion order but does require a separate assessment.[13] Nonetheless, the circumstances that led to the exclusion order may constitute a threat. When considering the present nature of such a threat, in light of the historic nature of the events at the heart of these cases, the Court of Justice finds that the mere presence of an individual on the territory of a Member State can constitute a present threat. In striking language, the Court finds that 'conduct of the individual concerned that shows the persistence in him of a disposition hostile to the fundamental values enshrined in Arts 2 and 3 TEU, such as human dignity and human rights, as revealed by those crimes or those acts, is, for its part, capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[14]

As with the AG, the Court outlines the key concerns that should feed into a proportionality assessment in both cases, including the need to respect the fundamental rights of the individuals and in particular the right to a family life as guaranteed by Art. 7 of the Charter of Fundamental Rights.[15] Finally, relying on its recent case-law in *B and Vomero*,[16] the Court found that the acquisition of permanent residence, in compliance with the conditions contained in Art. 7 of the Citizenship Directive, was a prerequisite

[11] Opinion of AG Saugmandsgaard Øe, *K and HF*, cit., paras 134-149.

[12] *K and HF*, cit., paras 43-46.

[13] *Ibid.*, para. 51.

[14] *Ibid.*, para. 60.

[15] *Ibid.*, para. 70.

[16] Court of Justice, judgment of 17 April 2016, joined cases C-316/16 and C-424/16, *B v. Land Baden-Württemberg and Secretary of State for the Home Department v. Vomero* (*B and Vomero*). The judgment in the case was pending at the time of AG Saugmandsgaard Øe's opinion was delivered. For a comment see S. Coutts, *The Absence of Integration and the Responsibilisation of Union Citizenship*, cit.

for the enjoyment of the heightened protection provided by Art. 28 of that Directive. It would not appear that Mr K had acquired permanent residence and therefore could not enjoy the heightened protection of Art. 28(3)(a).[17]

V. Comment

As pointed out in the introduction, *K and. HF* is a remarkable case both for the circumstances in which it arose and for the content of the judgment itself. Perhaps the ultimate outcome should not surprise, given the well-established restrictive trend in the Union citizenship case-law.[18] Nonetheless, the language used in the judgment and the interpretations applied to some basic concepts do underline emphatically some rather radical conceptual changes in in the expulsion regime for [of] Union citizens. In particular, contrary to historical interpretations and arguably the literal language of the Citizenship Directive, it confirms a regime that accommodates a moralised, backward looking and offence-based understanding of the threat to public policy and public security in addition to the traditional forward looking, harm-based assessment. This in turn confirms the expulsion regime as a tool to express certain societal values, both for the Member States, but increasingly for the EU itself.

The judgment is not universally restrictive. Indeed, in its tweet, announcing the judgment, the Court of Justice's account highlighted the fact that an expulsion order or any other measure restricting a Union citizen's rights under the Citizenship Directive cannot be the *automatic* consequence of a prior exclusion order. This, for the reasons pointed out by the AG, is surely correct and was surely never in doubt. The two regimes – asylum and Union citizenship – follow two very different logics, with very different rights at stake and indeed the individuals concerned have very different statuses *vis-à-vis* the State from which they claim those rights. To restrict the rights of a Union citizen or a family member of a Union citizen on the basis of an order issued during asylum proceedings – which, it should be pointed out, are not subject to a criminal standard of proof and are issued under a very different set of procedural guarantees – that took place a number of years before in very specific socio-historic contexts, would surely be to misunderstand the nature of the status of Union citizenship and the relationship be-

[17] *K and HF*, cit., paras 73-75.

[18] There are numerous pieces analysing this trend. See for example the collection in D. Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart, 2017. See also E. Spaventa, *Earned Citizenship: Understanding Union Citizenship through its Scope*, in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017 and N. Nic Shuibhne, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq*.

tween Union citizens and host Member States.[19] Nonetheless, on balance the judgment is restrictive in the sense that it facilitates the restriction of Union citizens' rights in second Member States and more over fundamentally changes – or adds to – the underlying function of the expulsion regime contained in Chapter VI of the Citizenship Directive.

Firstly, from a practical, but also conceptual point of view, is the striking admission that past conduct alone can constitute a threat to public security or public policy, a finding that is odd, considering the concept of threat is normally future (and risk) orientated and in light of the emphasis prior case-law and the Directive itself places on the need to establish some future threat or, in the case of persons convicted of crimes, the need to identify some risk of recidivism. This is possible by a focus not on any possible risk of reoccurrence – after all unlikely considering the very special historical circumstances at issue in these cases – but rather on the *presence* of the individual in the host Member State. Simply being there and sharing the same geographic and social space with the citizens of the host society is sufficient to constitute a threat to the fundamental interests of the host society. This is a result of a definition of the fundamental interests of the host Member States; their values which are affected by their being obliged to give residence rights to such individuals; their international relations and also the 'peace of mind' of the population.[20] Quite literally, it is their presence which disturbs and offends.

This brings us to the second element of the judgment, which confirms similar trends in *Tsakouridis*,[21] *PI*,[22] *Onukwere*[23] and *B and Vomero*,[24] the moralisation of the public security/public policy exception. What is perhaps implicit in the judgments of *Tsakouridis* and *PI* becomes explicit in the judgment of *K and HF*. The fundamental interests at stake, and which need to be protected, are the values of the Member States and the Union. It is a view of the criminal law premised on offence rather than harm and that does not require any threat to the physical security of the Member State but rather seeks to protect its moral order as embodied in the criminal law and the 'peace

[19] Described by Strumia as a relationship of 'mutual belonging'. See F. STRUMIA, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU*, Leiden: Martinus Nijhoff, 2013.

[20] *K and HF*, cit., para. 66. The Court references the peace of mind and security of the population but surely and this is implicit throughout the judgment, the actual threat to the physical security of the population is minimal.

[21] Court of Justice, judgment of 23 November 2010, case C-145/09, *Land Baden-Wurttemberg v. Panagiotis Tsakouridis*.

[22] Court of Justice, judgment of 22 May 2012, case C-348/09, *PI v. Oberburgermeisterin der Stadt Remscheid*. For a comment see L. AZOULAI, S. COUTTS, *Restricting Union Citizens' Residence Rights on Grounds of Public Security*, in *Common Market Law Review*, 2013, p. 553 *et seq.*

[23] Court of Justice, judgment of 16 January 2014, case C-378/12, *Nnamdi Onuekwere v. Secretary of State for the Home Department*. See also Court of Justice, judgment of 16 January 2014, case C-400/12, *Secretary for State for the Home Department v. MG*. For a comment see S. COUTTS, *Union Citizenship as Probationary Citizenship: Onuekwere*, in *Common Market Law Review*, 2015, p. 531 *et seq*.

[24] *B and Vomero*, cit.

of mind' of the community. The combination of this, alongside the finding that past conduct alone is sufficient to constitute a present threat, is a backward looking, offence based understanding of a threat to public policy and public security as opposed to the forward looking harm based understanding which dominates classic case-law such as *Bonsignore*[25] and *Ofanopoulos and Oliveri*.[26] Or rather, more accurately, the expulsion regime for Union citizens accommodates both versions: a classic harm based, future orientated risk assessment in addition to a backward looking, offence based, moral assessment of the conduct.

Which leads to a final point, the growing expressive dimension to the use of criminal law in the Union legal regime. Criminal law has long been recognised as having an expressive,[27] in addition to protective, dimension, expressing for the political community concerned the basic standards of behaviour and the fundamental ethical and moral values of that community.[28] The prominence of a values discourse in *K and HF* is striking. Notably, it is clear that it is both national and supranational values that are at stake. Previous cases focused on the fundamental interest of Member States and their ability to define what those interests were, albeit with references to relevant Union instruments.[29] This is consistent with the outcome of any expulsion cases, namely the expulsion from that particular Member State. What is worth underlining in the judgment in *K and HF*, is the emphasis placed by the Court on the *Union's* values as contained in Arts 2 and 3 TEU. While Arts 2 and 3 TEU are raised by Member States and by the Advocate General, the prominence of Arts 2 and 3 TEU is raised in the judgment itself. Thus "it must be emphasised that the crimes and acts that are subject to Art. 1F of the Geneva convention [...] seriously undermine both fundamental values such as respect for human dignity and human rights, on which, as stated in Art. 2 TEU, the European Union is founded, and the peace which it is the Union's aim to promote, under Art. 3 TEU".[30] And again, the threat posed by such an individual is evidenced by "the persistence [...] of a disposition hostile to the fundamental values enshrined in Arts 2 and 3 TEU".[31] It is

[25] Court of Justice, judgment of 26 February 1975, case 67/74, *Bonsignore v. Oberstadtdirektor der Stadt Köln*.

[26] Court of Justice, judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Georgios Ofanopoulos and Others and Raffaele Oliveri v. Land Baden-Würtemberg*.

[27] For the classic statement in relation to punishment see J. FEINBERG, *The Expressive Function of Punishment*, in *The Monist*, 1965, p. 397 *et seq.* This would be what McAdams would term an "expressive-politics theory of law". See R. H. MCADAMS, *The Expressive Powers of Law: Theories and Limits*, Harvard: Harvard University Press, 2015, p. 13.

[28] See also Duff's theory of the criminal law in R.A. DUFF, *Answering for Crime*, Oxford: Hart, 2007.

[29] See for example the reference to Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography in *PI*, cit., para. 46.

[30] *K and HF*, cit., para. 46.

[31] *Ibid.*, para. 60.

clear, that by its judgment and by facilitating the Member State's actions restricting the rights of Union citizens under the Citizenship Directive, the Court is adding the Union's condemnation to that of the Member State and taking the opportunity to express the values of the Union.

A final point worth making is the responsibilisation of the Union citizen that occurs in the judgment. Note that the main agent here is the Union citizen him or herself. It is his or her conduct and indeed 'disposition' which displays a hostility to the values of the Member State and the Union and who, presumably, must adjust his or her behaviour and 'disposition' in order to conform with those values in order to fully enjoy the rights derived from his or her status as Union citizen. This fact has of course always been contained in the expulsion regime, which from its inception has been based on the conduct of the individual. However, there is something of a shift in emphasis from a harm-based view of the public security exception, which focuses on the 'objective' harm or threat caused by the individual, to an offence-based view of the public policy exception, which necessarily implicates the moral responsibility of the individual, itself premised on his or her choices, conduct and indeed 'disposition'.

As noted in the introduction, *K and HF* is an exceptional case both in terms of the language used, which is striking at times, and the exceptional nature of the facts at issue in the cases, certainly in the case of Mr K. Nonetheless, regardless of the specific facts, *HF and K* provides the Court of Justice with an opportunity to confirm its refashioning of the conceptual underpinnings of the expulsion regime and to develop its expressive dimension, this time to the values contained in Arts 2 and 3 TEU. The result is an ever more moralised view of the public policy and public security exception and a focus on the responsibility of the Union citizen to conform with some basic values of the Member States and the Union as the price of the enjoyment of his or her rights under EU law.